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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JARON DEANDRE LUCIEN,

Defendant and Appellant.

B235869

(Los Angeles County
Super. Ct. No. BA 372640)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy, Judge. Affirmed.

Richard M. Doctoroff, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Jaron Deandre Lucien appeals from the judgment entered following a jury trial that resulted in his conviction of second degree robbery; findings of true by the jury on the criminal street gang and firearm allegations; and court findings that he had suffered a prior serious felony that also qualified as a strike under the three strikes law.¹ He was sentenced to prison for the total term of 35 years, consisting of the five-year upper term, doubled to 10 years based on his strike, plus the 10-year gang enhancement, the 10-year personal firearm use enhancement and the five-year prior serious felony enhancement.²

Appellant contends the trial court erred in denying his request to appoint an expert to challenge the eyewitness identification and thereby deprived him of effective assistance of counsel and due process of law. He challenges the gang enhancement on the grounds of insufficient evidence; admission of a photograph of inflammatory gang tattoos; and improper jury instruction on motive. He contends imposition of a 35-year sentence for an armed robbery during which no one was injured violates the bar against cruel and unusual punishment (U.S. Const., 8th Amend.).

We conclude appellant's contentions are unsuccessful and affirm the judgment.

BACKGROUND

We review the evidence, both direct and circumstantial, in light of the entire record and must indulge in favor of the judgment all presumptions as well as every logical inference that the jury could have drawn from the evidence. (*People v. Maury* (2003) 30

¹ The trial court also found true the prior prison term allegation, which the court later struck prior to sentencing.

² All statutory section references are to those of the Penal Code unless otherwise designated. The clerk's transcript recites the trial court found the alleged "strike prior to be true pursuant to . . . sections 667(a)(1) and 667.5(b)." This recital is incorrect. We deem the correct record to be the reporter's transcript. (*People v. Harrison* (2005) 35 Cal.4th 208, 226 [correct record depends on circumstances].) That transcript reflects the court found true the alleged prior serious felony allegation under section 667, subdivision (a)(1) and the prior prison term allegation under section 667.5, subdivision (b). In finding true the prior strike allegation, the court did not identify any specific statute. This is inconsequential in view of the fact the operative information alleged appellant suffered the prior strike under sections 1170.12, subdivisions (a) through (d) and section 667, subdivisions (b) through (i), namely, the three strikes law.

Cal.4th 342, 396; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1156; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

On June 7, 2010, about 8:30 a.m., appellant, followed by codefendant Christian Chan (Chan),³ entered a cigarette store on Slauson and Vermont Avenues in Los Angeles. Appellant asked proprietor Mohamed Khadir for cigarettes, pulled out a gun from his pocket, and placed the gun against Khadir's head. After demanding money, appellant and Chan forced Khadir to the back of the store where appellant pushed him to the ground. The two then tied Khadir with plastic zip ties. Chan who placed his knees in Khadir's back and had a hand on his neck, told Khadir, "If you move, you die."

Appellant walked around the store searching for money. He exited Khadir's office with a box containing about \$7,000 to \$8,000 in cash. He then put a towel in Khadir's mouth before he and Chan left. In addition to the box with money, appellant and Chan also took away Khadir's wallet, cell phone, and passport as well as two boxes, each containing 30 cartons of cigarettes.

The police arrived and retrieved video footage from several store surveillance cameras. Video footage was played to the jury.

On June 8, 2010, the police arrested appellant and Chan. Ana Chan (Ana),⁴ Chan's mother, told Los Angeles Police Department Officer Everado Amarado that on June 7, 2010, about 7:30 a.m., after receiving a phone call, Chan went outside the house. Ana saw a gray Ford Explorer pull up and recognized the driver as "Pappa," whom the officer knew as Duane Henderson. Appellant was the rear passenger. The police recovered a .32-caliber revolver from Chan's front porch and a box of cigarette cartons from appellant's home.

At trial, Officer Christopher Burke, the prosecution's gang expert, opined appellant and Chan were active members of the 67 Neighborhood Crips gang and that "Pa[p]pa" was

³ In the joint trial, the jury also found Chan guilty of second degree robbery and returned true findings on the gang and principal use allegations. Chan is not a party to this appeal.

⁴ We use the first name in our discussion for clarity's sake, meaning no disrespect. (*In re Marriage of Smith* (2007) 148 Cal.App.4th 1115, 1118, fn. 1.)

the nickname of Duane Henderson, also a member of that gang. Burke also opined the robbery was committed for the benefit of, at the direction of, or in association with a criminal street gang.

Appellant did not present any affirmative evidence. Robert Freeman, a former Los Angeles Police Department Officer and Chan's gang expert, testified the robbery could have been committed for personal gain rather than to benefit the gang.

DISCUSSION

1. Denial of Identification Expert Request Not Abuse or Error

Appellant contends he was deprived of effective assistance of counsel and due process of law, because the trial court erred in refusing to appoint an expert to challenge the eyewitness identification evidence. No abuse or error transpired.

Appellant filed an ex parte pretrial motion in pro. per. for appointment of an identification expert. In an undated declaration, he stated: "I will require the services of an eyewitness identification expert . . . to substantiate the defense claim of mistaken identification and also [to] illustrate[] an impermissible identification process/procedure." As the factual basis for his motion, he stated: "[T]he victim initially could not pick me out in a photographic showup." He added that he would make an additional showing "in more detail at an ex-parte chambers hearing . . . on a confidential basis because I may need to transmit privileged information and discuss tactics with the expert."

At the open court hearing, the trial court indicated that its intent was to read appellant's motion but not to appoint an identification expert if, as represented by the prosecutor, the store owner was the People's sole witness and there was a surveillance video depicting appellant and Chan robbing the store. Appellant explained the reason for his motion was "I was not picked out of the six-pack [photographic] lineup." The court responded this was a matter that "goes to the weight of the evidence" and "the camera speaks for itself." The court added that it was up to the jury to watch the video and decide whether appellant was depicted in the video. Appellant argued there was an "inquiry identification" and it was "suggestive." When asked by the court, he denied knowing whether there was a camera. After the prosecutor confirmed appellant had access to the

video, the court told appellant he was not entitled to an identification expert if the prosecution had someone who looked like him on film. The court took the matter under submission.

At the subsequent hearing, the trial court stated it had read appellant's motion "in detail." The court explained no basis existed for appointment of an identification expert in view of the video "coupled with a witness statement." Appellant objected that the witness only allegedly saw him once, which was in the courtroom, and "the video shows nothing." The court noted the objection for the record and denied the motion "based on the state of the evidence."

In a later pro. per. ex parte pretrial motion, appellant requested the trial court appoint Ralph E. Geiselman as an identification expert. He argued there was a "material issue of potential misidentification," because the victim's identification of appellant at the preliminary hearing was "inherently suggestive" in that appellant was "black"; he appeared in a Los Angeles County blue jump suit; and he was seated "at the side of defense counsel."

At the open court hearing, the trial court denied the motion, noting the court already had denied his previous motion.

"[T]he decision [whether] to grant a defendant's request for the appointment of such an expert remains within the sound discretion of the trial court. [Citations.]" (*People v. Hurley* (1979) 95 Cal.App.3d 895, 899.) We review the trial court's decision for an abuse of discretion. (*People v. Sanders* (1995) 11 Cal.4th 475, 507, 508.) In this instance, no abuse transpired.

In *People v. McDonald* (1984) 37 Cal.3d 351, our Supreme Court held, in an *appropriate* case, it would be error to exclude expert testimony concerning eyewitness identification. (*Id.* at p. 377, disapproved on another point in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) The court pointed out "the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion." (*Ibid.*) Although its expectation was "such evidence will not often be needed," the court concluded: "When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by

evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.” (*Ibid.*)

These are not our facts. First, Khadir’s identification of appellant was substantially corroborated by the independently reliable surveillance video of the robbery. Second, the record does not reflect any offer by appellant of specific psychological factor(s) which would affect the accuracy of Khadir’s identification and pertained to a subject matter sufficiently beyond common experience that an expert would assist the trier of fact (Evid. Code, § 801, subd. (a)). As noted by the trial court, it is for the jury, as the trier of fact, to determine whether a specific individual in the video is or is not appellant.⁵

Additionally, appellant had every opportunity to attack Khadir’s identification during cross-examination. Through counsel,⁶ this witness was thoroughly examined as to his ability to perceive; any uncertainty of identification; his failure to make a positive photographic identification; and his emotional state at the time of the offenses. In his motions, appellant did not set forth any reason why such a procedure would not be adequate, and as the events unfolded during trial, no particular indicia arose that would support the conclusion a defense identification expert would have been crucial.

The trial court therefore did not abuse its discretion by concluding that this was not an appropriate factual situation requiring the appointment of an identification expert.

2. Gang Enhancement Supported by Substantial Evidence

Appellant contends the gang enhancement is unsupported by the evidence, because the People’s gang expert’s opinion about the gang’s primary criminal activities was based

⁵ In his reply brief, appellant contends “the man’s face is unclear” in the “fuzzy surveillance videos and photographs printed from the videos” but expressly concedes “[t]he black man depicted in [the] videos and prints, admitted as exhibits, resembles appellant[.]”

⁶ Appellant relinquished his pro per status and counsel was appointed to represent him. Following the jury’s verdict, appellant was again granted pro. per. status.

on arrests rather than convictions, and as such, was based on conclusion rather than evidence. We disagree. Substantial evidence supports this gang-related finding.

The substantial evidence standard of review applies to a gang enhancement finding. We therefore examine the entire record in the light most favorable to this finding to determine whether substantial evidence that is reasonable, credible, and of solid value supports the gang enhancement finding. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371; *In re Lincoln J.* (1990) 223 Cal.App.3d 322, 330-331.)

The jury found true the gang enhancement allegation in the operative information. “To trigger the gang statute’s sentence-enhancement provision (§ 186.22, subd. (b)), the trier of fact must find that one of the alleged criminal street gang’s primary activities is the commission of one or more of certain crimes listed in the gang statute.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322 (*Sengpadychith*)). Two of these enumerated crimes are “(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245 [and] (2) Robbery.” (§ 186.22, subd. (e)(1) & (2).)

“[E]vidence of either past or present criminal acts listed in subdivision (e) of section 186.22 is admissible to establish the statutorily required primary activities of the alleged criminal street gang.” (*Sengpadychith, supra*, 26 Cal.4th at p. 323.) “The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group’s ‘chief’ or ‘principal’ occupations. [Citation.]” (*Ibid.*) “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute.” (*Id.* at p. 324.)

Elements of a gang enhancement may be proven by a combination of documentary evidence, percipient witness testimony, and expert opinion testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 626.) Moreover, “[t]he testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang’s primary activities.” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.)

Substantial evidence of the requisite primary activities committed by the 67 Neighborhood Crips exists based on the testimony of the People's gang expert, two of the People's exhibits, and evidence that appellant and Chan, two members of that gang, committed the charged gang-related robbery.

Burke testified during the course of his duties, he investigated robberies and gun charges, which were several of the primary activities of that gang. Burke also testified that in his opinion anytime two gang members committed a crime, which would include robbery, it was a gang-related offense.

People's exhibit 29, which is a certified minute order in Los Angeles Superior Court case No. (LASC No.) BA345599, reflects Avery Lamar White was convicted of committing assault with a firearm (§ 245, subd. (a)(2)) on August 27, 2008. Burke testified that he assisted in the underlying investigation and knew White and that White was an active member of the 67 Neighborhood Crips. People's exhibit 30, which is a certified minute order in LASC No. BA342303, reveals Roderick Johnson was convicted of this same offense on June 16, 2008, Burke testified that he was the arresting officer and at the time, Johnson was an active member of the 67 Neighborhood Crips.

Additionally, in finding robbery was a primary activity of the 67 Neighborhood Crips, the jury was entitled to take into account appellant and Chan, both active members of that gang, had committed the robbery on June 7, 2010. Burke testified June 7, which might be written as "6/7," was the gang's "birthday"; the gang would celebrate with a "hood party"; and robbery might be committed to fund the party.

3. Admission of Challenged Gang Tattoo Photograph Not Prejudicial

Appellant contends the gang finding must be reversed, because exhibit 21, a photograph of gang-related tattoos on his body, was unduly inflammatory. We disagree.

At sidebar, appellant's attorney objected to People's exhibit 21, which is a photograph of appellant's tattoos "NHC," "MURDER," "67," and "MONEY,"⁷ as "highly prejudicial" under Evidence Code section 352. She clarified that she had "no objection to

⁷ At trial, Burke testified "'NHC'" stood for "Neighborhood Crips" and this tattoo as well as the tattoos "MURDER," "67," and "MONEY" were all gang-related tattoos.

any tattoos that signify, six, seven, or NHC” or to People’s exhibits 22 through 28. The prosecutor argued the challenged tattoos were the most prominent on his body indicating his alliance to the Neighborhood Crips gang. She added the tattoos of “[m]urder and money are indicative of the primary activities of the gang[,] and putting them on his [body] shows his commitment to the gang, his commitment to the gang lifestyle, his knowledge and his intent to engage in gang activity.” The court surmised the gang expert would state the words “MURDER” and “MONEY,” which flanked the number “67,” were significant to the gang. The prosecutor clarified the expert would testify the gang had many attempted murders but he was unaware of any murder convictions.

After noting appellant placed the tattoos on himself, the court overruled the objection on the basis the tattoos “related to his commitment to gang activity.” The court also overruled the objection the tattoos should be excluded as cumulative.

Trial courts are vested with discretion in determining the admissibility of evidence under Evidence Code section 352, and “[t]he exercise of discretion is not grounds for reversal unless “the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” [Citations.]” (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438 (*Ochoa*), disapproved on another ground by *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

The trial court here did not abuse its discretion in admitting exhibit 21 in view of the highly probative value of the challenged tattoos. (*Ochoa, supra*, 26 Cal.4th at pp. 437-438.) Appellant’s cumulative objection was properly overruled, because gang-related photographs “are admissible even if repetitive of other evidence, provided their probative value is not substantially outweighed by their prejudicial effect.” [Citation.]” (*People v. Valdez* (2012) 55 Cal.4th 82, 134; see also *People v. Albillar* (2010) 51 Cal.4th 47, 62 [gang-related body tattoos probative of attack as gang-, not family-, related].)

Exhibit 21 was damaging but not prejudicial. “““The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. “[P]rejudicial” is not synonymous with “damaging.”” [Citation.]” [Citation.]

[¶] The prejudice that section 352 “is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.’ [Citations.] ‘Rather, the statute uses the word in its etymological sense of “prejudging” a person or cause on the basis of extraneous factors. [Citation.]’ [Citation.]” [Citation.]” (*People v. Doolin* (2009) 45 Cal.4th 390, 439.) “In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.’ [Citation.]” (*Ibid.*)

4. No Instructional Error Regarding “Motive” Shown

Appellant contends the trial court erred by giving conflicting instructions on whether motive is or is not an element of the gang enhancement, namely: CALCRIM Nos. 370, 1401, and 1403. His contention is without merit.

Initially, we point out the gang enhancement statute requires that the defendant harbored the “specific *intent* to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1), italics added; cf. *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [“specific intent to *benefit* the gang is not required”].) “Intent” therefore is an element of the gang enhancement. Motive is not.

In this regard, appellant confuses apples with oranges. A plain reading of CALCRIM Nos. 370, 1401, and 1403, whether viewed singularly, in combination, or all together, reflect these instructions cannot be understood to require the jury to consider the existence or nonexistence of motive in determining the truth of the gang enhancement allegation.

As appellant acknowledges, the trial court properly gave CALCRIM No. 370, which directed the jury the prosecution need not prove appellant harbored a *motive* to commit *the charged crime*. Motive, or lack of motive, may be a factor in determining whether the defendant is guilty or not guilty of the charge.⁸

⁸ As given, CALCRIM No. 370 instructed: “The People are not required to prove that the defendant had a motive to commit *the crime charged*. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.” (Italics added.)

CALCRIM No. 1403 clearly distinguishes between motive as to the charged crime and intent as to the gang enhancement. No. 1403 specifically provides gang evidence may be considered in determining whether the defendant had a motive to commit the charged crime(s) but does not address motive in the gang enhancement context. Rather, No. 1403 provides gang evidence may be considered to determine whether the defendant acted with the “intent,” purpose and knowledge required to prove a gang-related enhancement.⁹ Accordingly, No. 1403 is “neither contrary to law nor misleading” as to consideration of gang evidence on issues “germane to the gang enhancement” and on the “motive for the crime.” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166, 1167-1168.)

CALCRIM No. 1401, in pertinent part, instructed the jury to determine whether appellant committed the charged crime for the benefit of, or in association with, a criminal street gang and whether, in so doing, he *intended* to assist, further or promote criminal conduct by gang members.¹⁰ No. 1401 does not in any way address motive.

In support of his position reversal for instructional error is required, appellant relies on *People v. Maurer* (1995) 32 Cal.App.4th 1121 (*Maurer*) and *People v. Cameron* (1994) 30 Cal.App.4th 591 (*Cameron*). His reliance is misplaced, because these cases are factually inapplicable.

In *People v. Hillhouse* (2002) 27 Cal.4th 469, our Supreme Court explained in *Maurer*, “the defendant had been convicted of misdemeanor child annoyance under section 647.6. The [trial] court found that, although motive is not generally an element of a

⁹ As given, CALCRIM No. 1403 instructed: “You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related enhancements and[/]or [¶] The defendant had *a motive to commit the crime charged*.” (Italics added.)

¹⁰ As given, CALCRIM No. 1401, in pertinent part, instructed: “If you find the defendant guilty of the crime charged [robbery], you must then decide whether the People have proved the additional allegation that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang. [¶] To prove this allegation, the People must prove that: [¶] 1. The defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang; [¶] AND [¶] 2. The defendant intended to assist, further, or promote criminal conduct by gang members.” (Italics added.)

criminal offense, ‘the offense of section 647.6 is a strange beast,’ and it *did* have a motive as an element -- an unnatural or abnormal sexual interest. [Citation.] Thus the court found the instructions contradictory, and thereby erroneous. [Citation.] This case is distinguishable. Here, although malice and intent or purpose to steal were elements of the offenses, motive was not.” (*Id.* at p. 504.) Similarly, as discussed above, motive is not an element of the gang enhancement.

In *Cameron*, the court held the trial court committed reversible error in instructing the jury that voluntary intoxication was not a defense to a general intent crime, because “[v]oluntary intoxication is material to a finding of implied malice where that is an element of second degree murder.” (*Cameron, supra*, 30 Cal.App.4th at p. 599.) The court found the instruction to be an incorrect statement of the law and that it conflicted with other instructions. (*Id.* at p. 600 & fn. 4.) *Cameron* is of no comfort to appellant, because in this matter, the challenged instructions are not conflicting.

5. 35-Year Sentence Not Cruel and Unusual Punishment

Appellant contends imposition of a 35-year sentence for an armed robbery during which no one was injured violates the bar against cruel and unusual punishment (U.S. Const., 8th Amend.). No constitutional infirmity exists under these circumstances.

Appellant fails to demonstrate his sentence is grossly disproportionate to his punishment. At sentencing, the trial court stated it had read and considered both the People’s sentencing memorandum and the probation report, which reflected appellant was on active parole at the time of this crime and offered appellant the opportunity to address the court, which he declined.

The evidence established that during the robbery, appellant held a gun to Khadir’s head, and tied him up with his accomplice’s assistance. Appellant fails to point to anything that would take him outside the spirit of three strikes law or warrant a lesser sentence for his violent gang-related robbery. Accordingly, a prison sentence of 35 years, consisting of the five-year upper term, doubled to 10 years for his strike, plus the 10-year gang enhancement, the 10-year personal firearm use enhancement, and the mandatory five-year prior serious felony enhancement is not grossly disproportionate in view of appellant’s personal use of

force and threat of force against the victim and appellant’s recidivism. (See *Lockyer v. Andrade* (2003) 538 U.S. 63, 73, 77 [grossly disproportionality principle applicable only in “‘exceedingly rare’ and ‘extreme’ case” and rejecting challenge to sentence of 50 years to life for petty theft with prior].)

Appellant committed the robbery at age 28 and was not sentenced to a life term. His reliance therefore is misplaced on *Graham v. Florida* (2010) ____ U.S. ____ [130 S.Ct. 2011, 2017-2018, 2034] (life without possibility of parole imposed on defendant under age 18 for nonhomicide offense) and *People v. Caballero* (2012) 55 Cal.4th 262, 265, 268 (110-year-to-life sentence for juvenile’s nonhomicide offense).

DISPOSITION

The judgment is affirmed.

FLIER, Acting P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.